STATE OF MICHIGAN

COURT OF APPEALS

JACQUELINE BROOKS,

Plaintiff-Appellee,

v

BRUCE CAMPBELL DODGE, INC.,

Defendant-Appellant.

UNPUBLISHED
September 23, 2010

No. 293039
Wayne Circuit Court
LC No. 08-116907-NO

Before: BORRELLO, P.J., and JANSEN and BANDSTRA, JJ.

PER CURIAM.

Defendant appeals by leave granted the circuit court's order denying its motion for summary disposition under MCR 2.116(C)(10)[1] in this slip and fall action. We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff sustained injuries after she slipped and fell in a puddle of water while getting out of her SUV in the service area of defendant's automobile dealership. On appeal, defendant argues that the trial court erred by denying its motion for summary disposition because there is no genuine issue of material fact that (1) the puddle of water was open and obvious and (2) no special aspects existed to render the condition unreasonably dangerous. We agree with both contentions.

This Court reviews decisions on motions for summary disposition de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition under MCR 2.116(C)(10) is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). In reviewing the trial court's decision, "we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id*.

[1] Although defendant moved for summary disposition under both MCR 2.116(C)(8) and (C)(10), defendant challenges on appeal the circuit court's denial of summary disposition under subrule (C)(10) only.

Generally, a premises possessor owes a duty to exercise reasonable care to protect an invitee from a dangerous condition on its land that poses an unreasonable risk of harm. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). Under the open and obvious doctrine, however, where the invitee knows of the danger or where it is so obvious that a reasonable invitee should discover it, a premises owner owes no duty to protect the invitee unless harm should be anticipated despite the invitee's awareness of the condition. *Id.*; *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). A danger is open and obvious if "it is reasonable to expect an average user with ordinary intelligence to discover [it] upon casual inspection." *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993).

In *Lugo*, 464 Mich at 518, the Michigan Supreme Court characterized standing water as presenting such a clear open and obvious risk that the Court did not discuss its reasoning for such a conclusion. The alleged dangerous condition here, a puddle in the service area of defendant's automobile dealership, presents a similarly clear-cut case. First, the presence of a liquid puddle in the service area at a car dealership is neither unusual nor unforeseeable. Second, if casual inspection is to mean anything, it must at a minimum mean looking at one's surroundings, even if momentarily. Plaintiff concedes that she did not look at the floor when she stepped down from her SUV, meaning that she did not inspect at all. A reasonably prudent person would have looked before stepping out of the vehicle, and considering the size of the puddle – approximately two small buckets of water – in doing so, would have easily discovered the condition. Therefore, there is no question of fact that the condition was open and obvious.

Plaintiff asserts that the condition was not open and obvious because defendant's employee instructed her to park directly on the hazard and because the puddle was in an area that was almost impossible to see from an SUV. These arguments are unpersuasive. Even when viewed in the light most favorable to plaintiff, nothing in the record suggests that the employee instructed her to park in a particular spot in the service area or directly over the hazard. Rather, plaintiff testified that the employee merely told her to pull her vehicle into the service area. Moreover, no evidence demonstrates that plaintiff would not have seen the puddle, even from the height of her SUV, had she looked down. It is undisputed that plaintiff never looked at the floor in the service area. Thus, plaintiff did not casually inspect the area and the condition would have been obvious to a reasonable person who did engage in casual inspection.

Defendant also argues that the puddle was free from any special aspect that gave rise to a duty to protect against the open and obvious risk. The Michigan Supreme Court addressed the special aspects doctrine at length in *Lugo*, 464 Mich at 516-520. The doctrine provides that where "special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Id*. at 517. To constitute a special aspect sufficient to remove a condition from the open and obvious danger doctrine, the condition must pose a particularly severe risk of harm or be effectively unavoidable. *Id*. at 517-519. The illustrative examples that the Court provided of special aspects include: (1) an unguarded, 30-foot deep pit in a parking lot that creates a risk of particularly severe harm, and (2) a commercial building with one exit where water has completely flooded the floor, making the hazard unavoidable. *Id*. at 518.

Here, the puddle did not pose such a severe risk of harm that the condition should be deemed to have special aspects. The risk of falling a few feet to the floor does not render a condition unreasonably dangerous. As mentioned in *Lugo*, 464 Mich at 520,"[u]sing a common pothole as an example, . . . [u]nlike falling an extended distance, it cannot be expected that a typical person tripping on a pothole and falling to the ground would suffer severe injury." Moreover, the fact that a plaintiff in fact suffered severe harm does not justify a retrospective conclusion that the condition presented a special aspect. *Id*. at 518 n 2. Rather, a court is to assess a given risk *a priori*—i.e., before the incident occurred. *Id*. Likewise, the condition was not unavoidable. Considering the size of the puddle, had plaintiff looked before stepping, she could have easily avoided the hazard, either by walking around it, stepping over it, or moving her vehicle a few feet. Therefore, there is no question of fact that no special aspect existed to impose a duty on defendant despite the condition being open and obvious.

Plaintiff, in arguing to the contrary, again asserts that defendant's employee instructed her to park directly on the hazard and that the puddle was impossible to see from the height of her SUV. According to plaintiff, not only did such circumstances make the danger not readily apparent, but they also made it effectively unavoidable. These arguments are again without merit. As previously discussed, the record does not support plaintiff's claim that the employee instructed her to park directly on the hazard. Further, even assuming that plaintiff could not see the puddle from her SUV while sitting upright, she could have peered sideways outside the vehicle before stepping down.

Viewing the evidence in the light most favorable to plaintiff, there is no genuine issue of material fact that the condition was open and obvious and that no special aspects existed to render the condition unreasonably dangerous. Accordingly, the trial court erred in denying defendant's motion for summary disposition under MCR 2.116(C)(10).

We reverse. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Richard A. Bandstra